

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of )

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Toll Free Service Access Codes )

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CC Docket No. 95-155

**REPLY COMMENTS OF THE WEATHER CHANNEL, INC.**

The Weather Channel, Inc. ("The Weather Channel"), by counsel and pursuant to 47 C.F.R. § 1.415, submits these reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

**I. THE COMMISSION SHOULD PERMIT AN 800 NUMBER SUBSCRIBER TO PURCHASE A RIGHT OF FIRST REFUSAL FOR A NUMBER IN FUTURE TOLL-FREE CODES THAT ENDS WITH THE SAME SEVEN DIGITS AS ITS NUMBER.**

The Commission should establish a fee-based right of first refusal that entitles 800 subscribers to acquire the seven-digit duplicate of their current numbers in future toll-free access codes. The record in this proceeding reflects broad support for this proposal.<sup>1/</sup> Not only would a right of first refusal allow subscribers to protect the goodwill they have developed in their telephone numbers, it would also help to ensure that only those subscribers with a substantial

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<sup>1/</sup> For a representative sample of comments supporting a right of first refusal, see Comments of AT&T at 13; Comments of the 800 Users Coalition at 18; Comments of Americas Carrier Telecommunications Association at 17-18; Comments of the Direct Marketing Association at 9, 12; Comments of the General Services Administration at 2; Comments of LDDS Worldcom at 13; Comments of MCI at 15; Comments of NIMA International at 7.

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and quantifiable economic interest in their numbers reserve numbers from the pool of new toll-free codes. No other proposed solution will protect the interests of incumbent subscribers as effectively as a right of first refusal.

Not surprisingly, each RBOC opposes establishing a right of first refusal. These parties assert that deferring the release of vanity numbers represents a more reasonable solution to the problems 800 subscribers anticipate,<sup>2/</sup> and that trademark law is sufficient to protect subscribers from unfair competition.<sup>3/</sup> The RBOCs also argue that a right of first refusal will encourage the inefficient use of scarce numbering resources.

As discussed below, neither the RBOCs' delayed release proposal nor trademark law will adequately protect the interests of incumbent 800 subscribers. Moreover, if the Commission adopts a fee-based right of first refusal, as The Weather Channel suggests, toll-free numbers will not be used inefficiently.

**A. The RBOCs' Delayed Release Proposal Will Not Work.**

The RBOCs' delayed release proposal will not protect 800 vanity number subscribers from the losses they will incur if they cannot obtain the 888 analogue to their current numbers. The RBOCs argue that consumer education, together with the deferred release of vanity numbers, will be sufficient to eliminate the problems that will result from immediately releasing

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<sup>2/</sup> See Comments of BellSouth at 15; Comments of NYNEX at 8; Comments of Southwestern Bell at 17-18; Comments of U.S. West at 23.

<sup>3/</sup> See Comments of Bell Atlantic at 7; Comments of BellSouth at 16; Comments of GTE at 9. Neither Ameritech nor Pacific Bell proposes a way to protect the interests of incumbent 800 subscribers.

these numbers on a first-come, first-served basis.<sup>4/</sup> If consumers are educated about the existence of the new 888 prefix, it is argued, they will be less likely to dial an 888 number to reach an 800 number subscriber.<sup>5/</sup> If these education efforts are continued for long enough, 888 vanity numbers may be released on a first-come, first-served basis with no adverse effects.

This plan will not work. If educational efforts are intended simply to inform callers that toll-free calls may be placed using either 800 or 888 numbers, as early reports indicate, this will not resolve confusion. If, on the other hand, consumers are told that 888 numbers cannot be used to reach the businesses they are used to reaching by dialing familiar 800 numbers, this plainly will generate more confusion than it would reduce.

Furthermore, education alone will not solve all of the problems a first-come, first-served allocation method will produce. Callers continue to misdial 800 numbers with great frequency, for example, even though these numbers have been in service for decades. No amount of education will solve this problem. In fact, many subscribers with high volume 800 numbers simply acquire the telephone numbers that their customers frequently misdial to counteract the effects of this problem.<sup>6/</sup> People make dialing errors for a host of reasons that are not associated with their knowledge about toll-free service, and they will surely make dialing errors

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<sup>4/</sup> See, e.g., Comments of BellSouth at 15-16; Comments of NYNEX at 8; Comments of U.S. West at 19-20.

<sup>5/</sup> See, e.g., Comments of Bell Atlantic at 8 ("By the time that additional codes are needed, the public will have been made aware of the fact that there are now multiple kinds of toll-free numbers and should be expected to take care when copying numbers and dialing."); Comments of U.S. West at 20 ("If 888 duplicates of heavy volume 800 numbers are set aside and made unavailable for a period sufficient to allow for caller education, there should be much fewer misdialed or misdirected calls . . .").

<sup>6/</sup> See, e.g., Comments of 1-800-FLOWERS at 6 (discussing its experience with customers dialing a zero instead of an "O" for "FLOWERS").

concerning 800 numbers and their 888 equivalent despite the most well intentioned education efforts. Deferring the release of 888 vanity numbers will not solve these problems, it will simply postpone the onset of problems.

**B. Trademark Law Is Insufficient To Protect the Interests of Incumbent Toll-Free Subscribers.**

While trademark law may be sufficient to protect some 800 subscribers from unfair competition, it is not sufficient to protect all 800 subscribers. Current U.S. trademark law and the policies of the U.S. Patent and Trademark Office ("Trademark Office") offer only limited - and uncertain -- protection for vanity telephone numbers. Although some courts have protected the mnemonic equivalent of telephone numbers,<sup>7/</sup> one U.S. court of appeals has expressly refused to grant such protection.<sup>8/</sup> The uncertainty of whether, and to what extent, uniform protection will be provided makes the courts' existing treatment of vanity numbers inadequate.

Moreover, vanity telephone numbers are afforded less protection than more "traditional" word marks under present Trademark Office policy. On January 28, 1994, the Trademark Office issued Examination Guide 1-94 to codify the Trademark Office's examination practice concerning vanity numbers. Under the heading entitled "Marks Consisting of Merely Descriptive or Generic Terms in the Form of Telephone Numbers," the following instructions were provided:

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<sup>7/</sup> See, e.g., *Dial-A-Mattress Franchise Corp. v. Page*, 880 F.2d 675 (2d Cir. 1989) (protecting "1-800-MATTRESS").

<sup>8/</sup> See *Dranoff-Perlstein Assocs. v. Sklar*, 967 F.2d 852 (3d Cir. 1992) (refusing to enjoin competitors from using "INJURY" in their vanity telephone numbers, despite plaintiff's "INJURY-1" vanity telephone number).

If an applicant applies to register a mark which consists of a merely descriptive or generic term with numerals in the form of a telephone number, for example 800 or 900 followed by a word, *the examining attorney should refuse registration* under Trademark Act § 2(e)(1). The fact that the mark is in the form of a telephone number is insufficient, by itself, to render a mark distinctive . . . . This policy is effective immediately and supersedes all previous guidance related to this subject.<sup>9/</sup>

There is no indication that the Trademark Office intends to change existing policy to expand the scope of protection currently offered to vanity telephone numbers.

Current trademark law and practices concerning vanity telephone numbers are analogous to the limited and uncertain protection afforded to "domain names" -- the Internet equivalent of vanity telephone numbers.<sup>10/</sup> Notwithstanding the scant case law on this relatively new topic, commentators on the scope of trademark protection for Internet domain names agree that the questions of whether, and to what extent, such names may be protectible remain unresolved.<sup>11/</sup>

The ramifications of the lack of standards for protection and enforcement of Internet domain names should serve as a harbinger of the need for Commission action with regard to vanity telephone numbers. For example, the Internet Information Center offers domain name registrations on a first-come, first-served basis (as some commenters suggest the Commission should do with toll-free vanity numbers). As apparent justification for its lack of involvement in name protection, the Internet Information Center instructs users that trademark violations are the requestor's responsibility. One editorialist for *Newsday* registered the domain name

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<sup>9/</sup> PTO Examination Guide No. 1-94, p. 3 (Jan. 28, 1994)(emphasis added).

<sup>10/</sup> See, e.g., *MTV Networks v. Curry*, 867 F. Supp. 202, 203 n.2 (S.D.N.Y. 1994)("Internet domain names are similar to telephone number mnemonics . . . .").

<sup>11/</sup> See, e.g., Ray V. Hartwell III & S. Demm, *Courts Unclear Whether Internet Names Infringe*, NAT'L L.J. (May 8, 1995); *Billions Registered, But No Rules: The Scope of Trademark Protection for Internet Domain Names*, 7 J. PROPRIETARY RTS. 2-8 (Mar. 1995).

"ronald@mcdonalds.com" to demonstrate the ease with which one could profit by brokering these commodities.<sup>12/</sup> Such brokering flourishes absent a clearly defined and strictly enforced policy to prevent it. While it is nominally prohibited under the *Industry Guidelines*,<sup>13/</sup> for instance, toll-free number brokering occurs daily. The Commission should minimize 888 number brokering by providing 800 subscribers with a right of first refusal concerning their 888 analogues.

**C. A Fee-Based Right of First Refusal Will Not Cause Toll-Free Numbers To Be Used Inefficiently.**

The RBOCs argue that a right of first refusal would cause an inefficient use of numbering resources based on assumptions that (i) a large percentage of 800 subscribers will exercise the right to obtain their 888 analogues, and (ii) these subscribers will not use the 888 numbers once they acquire them. Neither assumption is correct.

First, although the RBOCs assume that a large percentage of 800 subscribers will exercise their right of first refusal, in fact the actual number of subscribers who would do so is likely to be small. One survey shows that only 6 percent of existing 800 subscribers consider their numbers to be worthy of protecting.<sup>14/</sup> Since there are nearly eight million 800 numbers,

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<sup>12/</sup> See Joshua Quittner, *Making a Name on the Internet*, *NEWSDAY*, Oct. 7, 1994, at A4.

<sup>13/</sup> See § 2.2.1.

<sup>14/</sup> See Comments of the 800 Users Coalition at 15-17 (this figure was derived by surveying Coalition members and examining the AT&T 800 Toll-Free Directory); see also Comments of the American Petroleum Institute at 4-5 (predicting that only a small percentage of 800 subscribers will exercise their right of first refusal); Comments of TLDP Communications, Inc. at 2-3 (estimating by mathematical analysis that less than 10% of toll-free numbers are vanity numbers).

this means that fewer than 500,000 numbers would be reserved from the 888 code through a right of first refusal. Under the proposal advanced by The Weather Channel, the quantity of numbers reserved would be substantially fewer than 500,000 since subscribers would have to pay a significant fee to exercise their right.<sup>15/</sup>

Second, it also is wrong for the RBOCs to assume that subscribers who reserve 888 numbers through a right of first refusal will not use those numbers efficiently. Given the substantial fee subscribers will be required to pay for their 888 analogues, it would make poor business sense to let the numbers remain idle. Moreover, many current 800 subscribers do not have static number needs, but often require new numbers to promote different products or to perform different services.<sup>16/</sup> These subscribers will need new numbers from the 888 code whether the numbers match their 800 numbers or not. Preventing incumbent subscribers from obtaining the 888 analogues to their 800 numbers will not conserve 888 numbers, but simply will reallocate those numbers among different subscribers. The difference is that incumbent subscribers may be harmed if others receive the 888 analogue to their numbers, whereas no one will be harmed if an 800 subscriber receives its own 888 analogue.

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<sup>15/</sup> Incidentally, denying incumbent subscribers a right of first refusal will not conserve numbers, as the RBOCs claim. 800 subscribers who are willing to pay for a right of first refusal will undoubtedly try to reserve the 888 duplicates of their numbers under a first-come, first-served allocation plan. *See* Comments of Aeronautical Radio, Inc. at 5; Comments of TLDP Communications, Inc. at 1-2.

<sup>16/</sup> *See, e.g.,* Comments of 1-800-FLOWERS at 9; Comments of the Direct Marketing Association at 3-5.

## II. CONCLUSION

The Commission should establish a fee-based right of first refusal for 800 subscribers because this is the most effective way for subscribers to protect the goodwill they have developed in their 800 numbers.

Respectfully submitted,

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